86-1129

Supreme Court, U.S.
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No. 86- .....

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1986

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In Re PAUL G. EVANS

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Respondent

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent's counsel unknown

Paul G. Evans, pro se
110 Merrain Road
Palm Beach, Fl. 33480
305-844-3382

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U.S.DISTRICT COURT

FOR MARYLAND

In re PAUL G. EVANS MISC. 2591

SHOW CAUSE ORDER

A complaint from Magistrate Frederic N. Smalkin having been filed in connection with the conduct of Paul G. Evans, Esq., a member of the bar of this Court, in writing a letter in connection with the case of Brown v. Rogers, Civil Action No. JH-80-855 (D. Md.), dated June 24,1985, in which said letter the said Paul G. Evans, Esq. is alleged to have stated that the Report and Recommendation of the Magistrate ". . . was either the result of . . . incompetence in the matter or perhaps worse and reflected a Jewish bias in favor of the Kaplan firm

whose actions were . . . inexcusable . . .", and said letter being arguably a violation of DR 1-102(A)(5) ["A lawyer shall not engage in conduct that is prejudicial to the administration of justice"]; DR 7-106(C)(6) ["In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal" ]; and DR 8-102(B) ["A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer"], it is this 9th day of January 1986, probable cause having been shown,

ORDERED that the said Paul G. Evans, Esq., 110 Merrain Road, Palm Beach, Florida 33480, show cause, by mail, within thirty (30) days after service of this Order upon him why, if any cause there be, he should not be disciplined; and it is further

ORDERED that a copy of this Show Cause Order be served upon the said respondent by certified mail.

/s Herbert F. Murray
Herbert F. Murray
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: :

PAUL G. EVANS, ESQ. : MISCELLANEOUS NO. 2591

REPORT AND RECOMMENDATION

[Caption]

REPORT AND RECOMMENDATION

On June 24,1985, Paul G. Evans, Esq., 110 Merrain Road, Palm Beach, Florida 33480, wrote to Magistrate Frederic N. Smalkin of this Court, stating that Magistrate Smalkin's Report and Recommendation in connection with the case of Brown v. Rogers, Civil Action No. JH-80-855 (D. Md.), ". . . was either the result of . . . incompetence in the matter or perhaps worse and reflected a Jewish bias in favor of the Kaplan firm whose actions were . . . inexcusable. . . . If in fact it represents incompetence I will drop the matter but if it is a Jewish bias I will file a complaint under the Rules for Handling Complaints of Judicial Misconduct or Disability."

Judge Howard of this Court had considered the

objections of Mr. Evans to Magistrate Smalkin's Report and Recommendation and, after rejecting those objections, had entered final judgment on November 19,1984 in Brown v. Rogers. An appeal to the Fourth Circuit Court of Appeals was filed on behalf of the client of Mr. Evans.

On June 26,1985, Magistrate Smalkin, upon receipt of the aforesaid letter, wrote to Mr. Evans as follows:

"This will respond to your scurrilous correspondence of June 24, 1985. I think you should know that I am taking the appropriate steps to refer this matter for disciplinary action against you.

"I assure you that I did not in this case, nor have I in any other case I ever have handled, display any bias against any person or in favor of any person for any reason, let alone for reasons of the religion of a party's counsel. Your accusations do not merit any further comment."

On or about June 29,1985, Mr. Evans filed a complaint against Magistrate Smalkin with the Judicial Council.

Concluding that the complaint of Mr. Evans "directly related to the merits of a decision or procedural ruling," Chief Judge Harrison L. Winter of the Fourth Circuit Court of Appeals dismissed the complaint on July 8,1985, pursuant to 28 U.S.C. § 372(c)(3)(A).

On behalf of the Disciplinary Committee of this Court, the undersigned judge wrote to Mr. Evans on September 24,1985, notifying him that the Disciplinary Committee of the Court had received a complaint from Magistrate Smalkin in connection with the conduct[1] of Mr. Evans in writing the letter, dated June 24,1985, and notifying him that the letter arguably was a violation of DR-1-102(A)(5) ["A lawyer shall not engage in conduct that is prejudicial to the administration of justice"]; DR 7-106(C)(6) ["In appearing in his professional capacity before a

tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal"]; and DR 8-102(B) ["A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer"]. In the letter of September 24,1985. Mr. Evans was given the opportunity to set forth in writing any explanation which he wished to make in justification of his actions, and he was told that the Disciplinary Committee tentatively believed it appropriate to defer any action on the complaint until after the appeal to the Fourth Circuit Court of Appeals in the civil case had been resolved.

Mr. Evans responded by letter dated September 27,1985, which stated in part:

"In respect of the opportunity you have offered to set forth in writing any explanation I care to make, I stand on the record in the above case [referring to Civil Action No. JH-80-855] as well as the record of the proceedings in the Fourth Circuit Judicial Council....

"I repeat my charge that Magistrate Smalkin was either incompetent or biased and I note that he has failed to deny either charge."
(Emphasis supplied)[by Judge Miller]

On November 5,1985, the undersigned member of this Court wrote again to Mr. Evans, advising him that the Disciplinary Committee of this Court, despite his objection, believed it appropriate to defer any action on the complaint against Mr. Evans until after the appeal in the civil case had been resolved.

By letter dated November 8,1985, Mr. Evans wrote again to the undersigned member of this Court, in which he stated in part:

"I repeat my claim that Magistrate Smalkin either was grossly incompetent or biased in favor of the Jewish firm that represented the defendants Rogers in Brown v. Rogers, C.A. No. JH-80-855 and against me and my client Brown, or both. I now repeat such charge and will continue to hold such belief and forthrightly make such claim notwithstanding the outcome of any appeal."
(Emphasis supplied) [by Judge Miller]

On January 2, 1986, the Fourth Circuit Court of

Appeals in Case No. 84-2380, decided the appeal of the underlying civil case. The basis for the Report and Recommendation of Magistrate Smalkin and for the District Court in dismissing the diversity action of Mr. Evans' client was a failure to satisfy the jurisdictional amount of $ 10,000.00. The Court of Appeals held that the dismissal was correct and that the District Court had correctly determined, as the Magistrate had stated, that Brown's claim for compensatory damages was, to a legal certainty, less than $ 10,000.00. The Court of Appeals went on to agree with the Magistrate and Judge Howard that Brown's claim for punitive damages and, along with it, his assertion of the jurisdictional amount was properly rejected, and that Brown's assertion of pendent jurisdiction was erroneous. In short the Court of Appeals agreed with all the reasoning and

statements of the Magistrate [2] contained in his Report and Recommendation.

On January 9,1986, a show cause order [3] was entered in this proceeding, directing Paul G. Evans, a member of the bar of this Court, to show cause by mail, if any he had, why he should not be disciplined. On January 27,1986, a response was received from the respondent to said show cause order[3].

The response of Mr. Evans, in part, stated as follows:

"Counsel submits that only three inferences are possible after reading the Report [referring to the Magistrate's Report and Recommendation]: i) the Magistrate was incompetent; ii) prejudiced; or iii) both. In any event the statement by Evans is not a knowingly false accusation.

* * * *

Evans submits he did not engage in conduct prejudicial to the administration of justice but rather was duty bound to seek to investigate the reasons for the egregious errors committed by the Magistrate, and to report him to the Judicial Council if there were not reasonable explanations therefor.

Rather than proceeding anonymously he forth-

rightly confronted the Magistrate.

**Evans does not apologize for his actions** and as a matter of conscience would repeat them under similar circumstances."
(Emphasis supplied) [by Judge Miller]

In the face of the clear opinion of the Fourth Circuit Court of Appeals, as well as the undersigned judge's own understanding of the applicable law, it is apparent that the Report and Recommendation of Magistrate Smalkin was, rather than being incompetent, highly competent.[4] The repeated assertions by Mr. Evans, even after the dispositive approving opinion of the Fourth Circuit Court of Appeals on the very matters which Mr. Evans contends were erroneously decided by the Magistrate, and his continued and unrelenting groundless assertions that the Magistrate acted out of bias, rather than in complaince with well-established rules of law, make it apparent that Mr. Evans acted originally and

continues to act, in a way prejudicial to the administration of justice in violation of DR 1-102(A)(5), in a way which is undignified and discourteous and degrading to a tribunal in which he appeared in his professional capacity, in violation of DR 7-106(C)(6),[5] and that he has made accusations against a judge or other adjudicatory officer which he knew or should have known were false, in violation of DR 8-102(B). In view of the circumstances outlined here, the undersigned member of this Court is of the view that the respondent lacks the necessary mental and character qualifications to continue to practice law in this Court. Accordingly, it is recommended by the undersigned judge that the full Court [6] enter an order disbarring Mr. Evans from further practice in this Court.

/sJames R. Miller,Jr.
James R. Miller, Jr.
United States District Judge

Date: February 5,1986

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1, 2, 3, 4, 5, & 6 The foregoing superscripts are to facilitate references in Petition's Argument.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: :

PAUL G. EVANS, ESQ. : MISCELLANEOUS
NO. 2591

ORDER

[CAPTION]

ORDER

The matter of the disciplinary proceedings against Paul G. Evans, Esq. having been referred to Judge Miller of this Court for Report and Recommendation; and

The Report and Recommendation of Judge Miller, dated February 5,1986, having been fully considered, it is this 12th day of February, 1986, by the United States District Court for the District of Maryland,

ORDERED that Paul G. Evans be, and he is hereby, disbarred from further practice in this Court; and it is further

ORDERED that a copy of said Report and Recommendation and of this Order be mailed by the Clerk to the said Paul G. Evans; to the Fourth Circuit Court of Appeals; and to the Attorney Grievance Commission.

s/Frank A. Kaufman
Chief U.S. D. J.

s/James R. Miller,Jr.
U.S.D.J.

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U.S.D.J

s/Joseph H. Young
U.S.D.J.

s/Herbert H. Murray
U.S.D.J.

s/Walter E. Black
U.S.D.J.

[left blank]
U.S.D.J.

s/Norman P. Ramsey
U.S.D.J.

s/John R. Hargrove
U.S.D.J.

s/J. Frederick Motz
U.S.D.J.

---

[There were 10 active United States District Judges at the time being for the District of Maryland. The blank spaces represent the places for the signature of Judges Harvey and Howard who was the Judge that decided the underlying matter, Brown v. Rogers, C.A. No. JH-80-855, in the order of their respective seniority. The record does not indicate why their signatures do not appear.]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 86-1569

In re Paul G. Evans, Petitioner,

O R D E R

Filed July 2,1986

Upon the application of Evans, it is ORDERED that a certain memorandum dated July 2,1985 from Magistrate Smalkin to Judge Black shall be, and it hereby is, made a part of the record in this proceeding. The clerk of the District Court will see that the same is transmitted to the clerk of this court, has that not already been accomplished.

The internal memoranda and like papers which may have been used by the district court in arriving at its decision are not a part of the record in this case, and consideration of such is impermissible. It is ORDERED that the request that the said internal memoranda and like papers be made a part of record in this case shall be, and it hereby is, denied.

Evans' further request that all papers that were

before the district court or its committee in arriving at its decision be made a part of the record, we think has already been complied with, and it is ORDERED that Evans' request is denied for that reason. Should Evans have any information that there are any papers in possession of the district court other than the internal memoranda, etc., above referred to, which were used in arriving at its decision, he should promptly advise us of such information, and we may then reconsider his request.

With the concurrences of Judge Hall and Judge Murnaghan.

s/H. Emory Widener, Jr.
For the Court

July 2,1985

Magistrate Smalkin

Brown v. Rogers
Civil No. JH 80-855

Honorable Walter E. Black, Jr.
Member of Disciplinary Committee

Attached hereto please find correspondence pertaining to Paul G. Evans, Esquire, a member of the bars of Maryland, this Court, and the Fourth Circuit. I am forwarding for whatever disciplinary action, if any, the Disciplinary Committe of this Court feels appropriate, Mr. Evans' letter to me dated June 24,1985.

As you will notice, Mr. Evans appears to have filed a complaint against me with the Fourth Circuit Judicial Council. This complaint was received by me after the correspondence I sent Mr. Evans dated June 26th in which I informed him that I was taking the appropriate steps to refer the matter for disciplinary action.

Respectfully,

initialed F N M
Frederic N. Smalkin
U.S. Magistrate

Attachments
[Petitioner is not certain of what Attachments were enclosed with the aforesaid memorandum. Annexed are a copy of his letter of 6-24-85 to Smalkin, Joint Appendix(J.A.) p. 71 and the Magistrate's Reply of 6-26-85 J.A. p. 72. Not included is a copy of the complaint to the Judicial Council which was under separate cover later sent to Smalkin as noted by him. Further it was counsel for the District Court who insisted that the foregoing memorandum without attachments be included in Joint Appendix, see Opening Brief p.6 and Reply Brief pp. 7-11.]

[Letterhead of Paul G. Evans]

Magistrate Frederic N. Smalkin
101 W. Lombard Street
Balt., Md. 21201

June 24,1985

Dear Magistrate Smalkin:

I write you regarding your Report & Recommendation in a matter captioned Rogers v. Heath, JH 80-855 dated and filed September 11,1984, and enclose herewith a

copy of my Motion for Summary Reversal which was denied without opinion on June 12,1985 No. 84-2380, and of my brief without the table of contents.

I feel that your Report was either the result of your incompetence in the matter or perhaps worse and reflected a Jewish bias in favor of the Kaplan firm whose actions were in my judgment inexcusable in this cause. If in fact it represents incompetence I will drop the matter but if it is a Jewish bias I will file a complaint under the Rules for Handling Complaints of Judicial Misconduct or Disability.

Before I take such action I afford you an opportunity of setting forth your reasons for your prejudiced and incomplete Report.

Very truly yours,

s/Paul G. Evans

[Letterhead of Magistrate Smalkin]

June 26,1985

Paul G. Evans, Esq.

110 Merrain Road

Palm Beach, FL 33480

Brown v. Rogers
Civil Action JH 80-855

Dear Mr. Evans:

This will respond to your scurrilous correspondence of June 24,1985. I think you should know that I am taking the appropriate steps to refer this matter for disciplinary action against you.

I assure you that I did not in this case, nor have I in any other case that I have ever handled, display any bias against any person or in favor of any person for any reason, let alone for reasons of the religion of a party's counsel. Your accusations do not merit any further comment.

Very truly yours,

[initialed] F N S
Frederic N. Smalkin
U.S. Magistrate

**FNS/bad**

cc: Joseph A. Hass, Clerk of Court
(D.Md.)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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NO. 86-1569

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In Re: Paul G. Evans,

Petitioner.

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[Caption in No. 86-1569]

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, Chief District Judge, James R. Miller, Joseph H. Young, Herbert F. Murray, Norman P. Ramsey, Walter E. Black, John R. Hargrove, and J. Frederick Motz, District Judges, setting en banc. (C/A 0416-1)

**PUBLISHED**

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Argued: July 17, 1986 Decided: September 23,1986

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Before WIDENER, HALL and MURNAGHAN, Circuit Judges

---

Paul G. Evans, Pro Se; Peter Frederick Axelrad (Frank, Berstein, Conaway & Goldman on brief) for Respondent.

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HALL, Circuit Judge:

Paul G. Evans, an attorney, appeals from the order of the United States District Court sitting in the District of Maryland, disbarring him from the practice of law in that court. We affirm.

I.

In April, 1980, attorneys Arthur Webster, Paul D. Bekman, and the law firm of Kaplan Heyman Greenberg

filed a diversity action in the United States District Court sitting in the District of Maryland, naming James D. Brown and Loius (sic) Rogers as plaintiffs. The action was brought to recover damages incurred when Brown's automobile, which was being driven by Rogers, collided with a tractor-trailer in Maryland. It is now alleged that Brown did not retain the Kaplan firm or authorize it to proceed in his behalf. In any event, after Brown refused an offer of settlement[1] proposed by defendants' insurance company, he retained appellant Evans to represent him. On behalf of Brown, Evans filed a cross-complaint against Rogers and added Rogers' brother, George, as a defendant, claiming fraudulent conversion of his automobile. Through Evans, Brown eventually moved for [partial] summary judgment.

On July 12, 1984, District Judge Joseph C. Howard referred the case to Magistrate Frederic N. Smalkin to rule on all pending motions. Magistrate Smalkin filed a report on September 11, 1984, in which he recommended that the case be dismissed for lack of subject matter jurisdiction due to Brown's failure to prove an amount in controversy

in excess of $ 10,000.

Brown, through Evans, filed timely objections to Magistrate Smalkin's report with Judge Howard. On November 19, 1984, Judge Howard, after conducting a de novo review, issued an opinion, which adopted [in part][2] the magistrate's report and ordered the case dismissed for lack of subject matter jurisdiction. An order dismissing Brown's case and entering judgment in favor of defendants was filed the following day. On December 10,1984, Evans appealed to this Court on Brown's behalf. His subsequent motion for summary reversal was denied by this Court on June 12, 1985.

While the appeal was still pending, Evans wrote a letter on June 24,1985, to Magistrate Smalkin. Evans' letter stated in pertinent part as follows:

> I feel that your Report was either the result of your incompetence in the matter or perhaps worse and reflected a Jewish bias in favor of the Kaplan firm whose actions were in my judgment inexcusable in this cause. If in fact it represents incompetence I will drop the matter but if it is a Jewish bias I will file a complaint under the Rules for Handling Complaints of Judicial Misconduct or

> Disability.
> Before I take such action I afford you an opportunity of setting forth your reasons for you (sic) prejudiced and incomplete Report.

Magistrate Smalkin responded with a letter to Evans, dated June 26, 1985, in which he stated:

> This will respond to your scurrilous correspondence of June 24,1985. I think you should know that I am taking the appropriate steps to refer this matter for disciplinary action against you.
> I assure you that I did not in this case, nor have I in any other case I have ever handled, display any bias against any person or in favor of any person for any reason, let alone for reasons of of the religion of a party's counsel. Your accusations do not merit any further comment.

Evans filed a complaint against Magistrate Smalkin with the Judicial Council for the Fourth Circuit on June 29,1985. Pursuant to 28 U.S.C. § 372(c)(3)(A)(ii), the complaint was dismissed by order of Chief Judge Winter filed on July 10,1985, on the ground that it directly related to the merits of the magistrate's ruling, and, as such, was beyond the scope of the statute.

On September 24, 1985, District Judge James R. Miller, Jr. wrote to Evans, advising him, on behalf of the

district court's disciplinary committee, that his letter to Magistrate Smalkin was arguably in violation of the following three rules of professional responsibility: DR 1-102(A)(5) ("A lawyer shall not engage in conduct that is prejudicial to the administration of justice."); DR 7-106(C)(6) (In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal."); and DR 8-102(B) ("A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."). Judge Miller further provided Evans with an opportunity to set forth in writing any explanation he cared to make in justification of his actions. Finally, Evans was informed that the committee preferred to defer any action on the matter pending resolution of the appeal to this Court in the Brown case.

On September 27, 1985, Evans wrote Judge Miller, objecting to deferral of the matter pending the appeal in Brown and stating that:

* * * In respect of the opportunity you have

> offered to set forth in writing any explanation I care to make, I stand on the record in the above case as well as the record in the proceedings in the Fourth Circuit Judicial Council, copies of which are enclosed.
> I repeat my charge that Magistrate Smalkin was either incompetent or biased and I note he has failed to deny either charge. I desire an opportunity to call the Magistrate and examine him under oath if a hearing is held in this matter. I do not personally know him and if there is to be a hearing I desire ample notice so that I might investigate his background and read opinions authored by him.
> * * *.

In subsequent correspondence to Judge Miller, Evans reiterated his desire to subpoena Magistrate Smalkin. On November 8,1985, Evans further wrote:

> * * * I find the decision of the Disciplinary Committee to defer any action in this matter until after the appeal(in this matter) [matter in parenthesis misquoted—it should be deleted—] has been resolved is incredible. I repeat my claim that Magistrate Smalkin either was grossly incompetent or biased in favor of the Jewish firm that represented the defendants Rogers in Brown v. Rogers, C.A. No. JH-80-855 and against me and my client Brown, or both. I now repeat such charge and will continue to hold such belief and forthrightly make such claim notwithstanding the outcome of any appeal.[2]

On January 2, 1986, a panel of this Court affirmed the dismissal of the Brown case, specifically rejecting Brown's jurisdictional contentions. Brown v. Rogers, No. 84-2380 (4th Cir. January 2,1986) (unpublished).

Subsequently, District Judge Herbert F. Murray entered an order on January 9,1986, requiring Evans to show cause why he should not be disciplined for writing the June 24, 1985, letter to Magistrate Smalkin, in violation of DR 1-102(a)(5), DR 7-106(C)(6),[3] and DR 8-102(B). Evans filed a response on January 25,1986, defending his conduct and stating that, "only three inferences are possible after reading the (magistrate's) report: (i) the Magistrate was incompetent; (ii) prejudiced; or (iii) both." Evans also stated that he was duty-bound to seek an investigation "of the reasons for the egregious errors committed by the Magistrate," that he did not apologize for his actions, and that "as a matter of conscience [he] would repeat them under similar circumstances." Appellant did not request a hearing.[3]

On February 5, 1986, Judge Miller filed a report in

which he recommended that Evans be disbarred from further practice in the district court. Judge Miller reasoned that:

[ Opinion quotes from superscript [4] to end of Judge Miller's Report and Recommendation set forth at pp. 11-12 of this Appendix]

This report was subsequently adopted by the district court, which on February 12, 1986, entered an order of disbarment, signed by eight of the district judges. This appeal followed.

II.

On appeal Evans contends that his remarks to Magistrate Smalkin are protected conduct under the first amendment and, therefore, not subject to the disciplinary sanction of disbarment. Appellant also argues that he was deprived of his right to a hearing below, that Judge Miller's participation[5] in the disbarment proceedings was improper, and that the record is incomplete. We disagree with each of these contentions.

A court has the inherent authority to disbar or

suspend lawyers from practice. In re Snyder, ——— U.S. ———, 105 S.Ct. 2874, 2880 (1985). This authority is derived from the lawyer's role as an officer of the court. Id. Moreover as an appellate court, we owe substantial deference to the district court in such matters:

> On the one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other hand, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself.

Ex parte Burr, 22 U.S. (9 Wheat.) 529, 529-30 (1824). See also, In re G.L.S., 745 F.2d 856 (4th Cir. 1984). In this case, we can only conclude that the district court's disbarment of Evans, based on his violation of the rules of professional conduct,[6] is amply supported by the record and did not exceed the limits of the court's discretion.

Evans' letter, accusing Magistrate Smalkin of incompetence and/or religious and racial bias,[7] was unquestionably undignified, discourteous, and degrading. Moreover, it was written while the Brown case was on appeal to this Court and was thus properly viewed by the district court as an attempt[8] to prejudice the administration of justice in the course of the litigation.

In addition, Evans' accusation, which he repeated throughout the proceedings below and has continued to repeat on appeal, was based solely on the magistrate's single decision which this Court ultimately affirmed. We note that Evans never took any action against the Kaplan firm, which he viewed as having acted without Brown's authorization.[8] More significantly, Evans never made any attempt to investigate the magistrate's actions in other proceedings or otherwise establish a reasoned basis for the charges of incompetence or bias.[9] Appellant's failure to substantiate charges as grave as the ones leveled here certainally constitute the making of accusations which he knew or reasonably should have known to be false.

Finally, appellant's failure to investigate, coupled with his unrelenting reassertion of the charges even after this Court's affirmance in Brown, convincingly demonstrates his lack of integrity and fitness to practice law. A person guilty of such practices is, as at least one court has commented:

> dangerous in any walk of life and is especially so when he occupies the responsible position of an attorney upon whose good faith, truthfulness, sense of propriety and ethical standards both courts and litigants are entitled to rely.

In the Matter of Greenfield, 24 A.D.2d 651, 262 N.Y.S.2d 349, 351 (N.Y. App. Div. 1965)

Although courts and judges may lawfully be criticized, we are not at all persuaded, as our foregoing remarks illustrate, by appellant's position that the type of "criticism" involved here is protected first amendment expression for which disbarment, contempt, or other disciplinary sanctions are unavailable. In the first place, the issue here is not contempt but the qualifications[10] of appellant to practice law in the district court of Maryland. Therefore, the cases which appellant has cited to us involving

the limits of a court's contempt powers are not dispositive. Secondly, although the circumstances of this case may be somewhat unique, we are aware of other cases, involving substantially similar circumstances, which provide clear support for the district court's disbarment of Evans.

In Greenfield, supra, an attorney was suspended from practice for three years for professional misconduct and conduct prejudicial to the administration of justice. After a judge had denied the attorney's motion in a pending action, Greenfield, along with another attorney, Rothstein, wrote two letters to the judge accusing him without any basis in fact of misconduct in office. The attorneys also prepared and circulated letters and affidavits concerning the alleged misconduct to the presiding judge of the court, as well as the Governor, the District Attorney, and the Judicial Conference. Greenfield later recanted the charges and apologized for his conduct, stating he had acted on the basis of false information given to him by Rothstein and another associate, which he had accepted without making any investigation.[1/] In support of its suspension order , the New York court observed:

> Judicial officers, as we have said, are not immune from suit or criticism; but, like every one else, they are protected against scandalous charges. To make a public, false and malicious attack on a judicial officer is more than an offense against him individually; it is an offense against the dignity and integrity of the courts and of our judicial system. It may bring discredit upon the administration of justice amongst citizens who have no way of determining the truth of the charges. It tends to impair the respect and authority of the court. In this and in other jurisdictions, the rule is well settled that an attorney who engages in making false, scandalous or other improper attacks upon a judicial officer is subject to discipline.

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1/ Here, to the contrary, Evans does not recant his charges or apologize for his actions—a factor which certainly can be considered in deciding the severity of the sanction imposed and in choosing between disbarment or some lesser form of discipline.

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Id. at 350-51 (quoting from Matter of Bevans, 225 A.D. 427, 431, 233 N.Y.S. 439, 443 (N.Y. App. Div. 1929)) (citations omitted).

In a similar vein, the Supreme Court of Illinois ordered an attorney's name striken from the rolls of practicing lawyers after the attorney had brought an unauthorized lawsuit, furnished a story to the press, and wrote a letter to a judge, who had decided a divorce case

against his client. The letter stated in part that the attorney was usually engaged in dealing with men and not irresponsible political manikins or appearances of men. Although the attorney denied that his letter to the judge was scurrilous, defamatory, or without justification, the Illinois court held:

> There was not the slightest irregularity or illegality in the action of Judge Thomson in permitting the bill of review to be filed, setting aside the decree of divorce, permitting an answer and cross-bill to be filed or granting the divorce to Peter W. Peterson. Judges are not exempt from just criticism, and whenever there is proper ground for serious complaint against a judge it is the right and duty of a lawyer to submit his grievances to the proper authorities, but the public interest and the administration of the law demand that the courts should have the confidence and respect of the people. Unjust criticism, insulting language and offensive conduct toward the judges, personally, by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted. The letter written to the judge was plainly an attempt to intimidate and influence him in the discharge of judicial functions, and the bringing of the unauthorized suit, together with the write-up in the Sunday papers, was intended and calculated to bring the Court into disrepute with the public.

The People ex rel. The Chicago Bar Ass'n, Relator, v.

Metzen, 291 Ill. 55, 125 N.E. 734, 735 (1919). Cf. Kentucky Bar Ass'n v. Williams, No. 83-SC-893-KB (Ky. 1984) (lawyer suspended from the practice of law for three months due in part to a disrespectful letter to a trial judge labeled as "private correspondence to you as a man, and not in your capacity of a judge").

In other cases, letters critical of judges, which were written in the heat of anger or on impulse, have been the subject of suspensions and public repremands. See In re Rogers, 212 P.2d 1034 (N.M. 1923); In re Manheim, 113 A.D. 136, 99 N.Y.S. 87 (App. Div. 1906). Although in these cases the courts declined to impose the ultimate sanction of disbarment, they nevertheless, strongly condemned such actions as violations of the rules of conduct and grounds for disbarment. Here, of course, Evans disclaims any suggestion that he was acting on impulse or in the heat of anger. Moreover, he waited until nine months after the magistrate's decision issued to make his calculated but unsubstantiated charges.2/ Given all the circumstances present in this case, including Evans' repeated reassertions of the unsubstantiated charges, we find that the district

court did not abuse its discretion in ordering Evans disbarred.

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2/Furthermore, this case is unlike the one addressed by the Supreme Court in In re Snyder,——U.S.——,105 S.Ct. 2874 (1985), where a lawyer's letter to a judge's secretary, criticizing the inequities of the Criminal Justice Act, was held not to be grounds for discipline.

III.

Furthermore, our examination of the record reveals no procedural irregularities in the conduct of the disbarment proceedings below. Evans was certainly given adequate notice of the charges which the court was considering against him as a result of his letter to Magistrate Smalkin. Although prior to the show cause order of January 9,1986, Evans had indicated in correspondence to Judge Miller his desire to call the magistrate as a witness if a hearing were held, a hearing is not automatic under the district court's rules, Rule 2-A-V-D provides that:

> Upon a respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation, this Court shall set the matter for proper hearing. . . .

An attorney is charged with knowledge of a court's

rules and Evans' failure to request a hearing when he answered the show cause order[11] constitutes a waiver of his right to a hearing. Moreover, we are unable to see how a hearing would change the result reached below, in light of appellant's failure to contest any factual issue or present mitigating circumstances.

Nor do we perceive any basis for Evans' allegations of impropriety against Judge Miller. The participation of Judge Miller in the proceedings against Evans, both as a judge of the district court recommending disbarment and as a member of the court's disciplinary committee, suggests no impropriety. Unlike appellant, we find no attempt to mislead him into thinking that Judge Miller would not be further involved in the matter after Judge Murray signed the show cause order. Moreover, had Evans wished to seek the recusal of Judge Miller or any other district judge, he could have filed an appropriate motion[12] at the time he was ordered to show cause why he should not be disciplied.

Finally, our review of the record, including the appendix prepared by Evans for this appeal, reveals no deficiencies in the state of the record.[3/]

IV.

For the foregoing reasons, the order of the district court, disbarring Evans from practicing law in that court is affirmed.

AFFIRMED

3/ We reject appellant's assertion at oral argument that because the letter dated July 2,1985, from Magistrate Smalkin to Judge Walter E. Black, Jr., a member of the district court's disciplinary committee, was made a part of the record [at the insistence of counsel for the district court] without its stated attachments [or designation thereof], there are documents missing from the record which may not have been considered below. We conclude that, given the date and contents of the July 2 letter, it must be inferred that the attachments were Evans' letter of June 24, 1985, to the magistrate, his response of June 26, 1985, and Evans' complaint to the Judicial Council [dated June 29,1985.].

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[ Superscripts without slash are inserted to facilitate references to Court's opinion in Petitioner's Argument.]

The Daily Record, 1st Section p.1 col.1
Vol. 197 No. 76 9-29-86
Kenneth D. Karpay, Managing Editor

**'Scurrilous' lawyer's disbarment affirmed**

A federal appeals court has affirmed the disbarment of an attorney because of a letter he sent to a federal magistrate criticizing the court officer of bias and incompetence. In Re: Paul G. Evans. No. 86-1569, Decided: Sept. 23,1986, Published.

The attorney's claim that the first amendment insulated him from disciplinary action was turned aside by the appellate court last week. But the lawyer's promise to pursue efforts to exhonerate his name could give rise to further elaboration on the extent to which attorneys may criticize a judge or court officials without facing disciplinary action.

**A tort claim**

The difficulties of lawyer Paul G. Evans began after he agreed to represent James D. Brown, a client in a civil lawsuit in the federal district court in Baltimore, stemming

from an automobile accident. A civil claim by Brown and Loius (sic) Rogers was filed against a defendant by Attorneys Arthur Webster and Paul D. Bekman of Kaplan, Heyman & Greenberg. But Brown subsequently denied he had retained Webster or Bekman and instead hired Evans to represent him. Evans then filed a complaint against Rogers.

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**'We are not persuaded that the criticism here is protected first amendment expression for which disbarment' would not be proper.—Judge K.K. Hall**

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Brown's claim against Rogers was referred to Frederic C. Smalkin, a federal magistrate. (Smalkin was confirmed by the U.S. Senate as a federal district court judge on Thursday evening.[September 25,1986]) Smalkin found the suit involved less than $10,000—the amount necessary for federal court subject matter jurisdiction— and in a written report he recommended the case be dismissed.

Smalkin's report was forwarded to federal district court judge Joseph C. Howard who adopted Smalkin's recommendations and dismissed the case. Evans filed an

appeal of that ruling to the U.S. Court of Appeals for the Fourth Circuit.

**Claim of bias**

While the appeal was pending Evans sent Smalkin a letter. In that correspondence Evans wrote that Smalkin's report was either "the result of your incompetence in the matter or perhaps worse and reflected a Jewish bias in favor of the Kaplan firm.

"If in fact it represents incompetence I will drop the matter but if it is a Jewish bias I will file a complaint ...

"Before I take such action I afford you an opportunity of setting forth your reasons for you[r] prejudiced and incomplete [r]eport."

Smalkin responded in writing to Evans two days later denying any bias and then referrred the matter to a disciplinary committee.

Evans himself filed a complaint against Smalkin in June 1985. That complaint was dismissed by the chief judge of the federal circuit court.

Three months later Evans was notified that he had become a subject of a federal district court disciplinary committee in a letter from federal district judge James R. Miller. The judge's letter explained that Evans had been accused of violating three rules of professional misconduct:

* that a lawyer shall not engage in conduct prejudicial to [the administration of] justice (DR-1-102(A)(5);

* that a lawyer shall not be discourteous or undignified, or degrade a court (DR 7-106(C)(6);

* and that a lawyer shall not knowingly make false accusations against an adjudicatory officer. [DR 8-102(B)]

On at least three occasions Miller and another judge wrote Evans and offered him an opportunity to explain or justify his actions. Evans responded by repeating his charges and requesting an opportunity to examine Smalkin under oath.

In February 1986 Evans was disbarred from practicing law in the federal district court for Maryland in an order signed by eight of the district court judges.

**First Amendment**

On appeal to the fourth circuit, representing himself, Evans claimed his comments to Smalkin were protected under the First Amendment.

The district court was represented before the circuit court by Peter F. Axelrad of Frank, Bernstein, Conaway & Goldman.

The appellate court rebuffed each of Evans's claims. An opinion written for a three judge panel by circuit judge K.K. Hall concluded that Evans's letter "was unquestionably undignified, discourteous, and degrading." The letter, Hall continued, was based solely on one action by Smalkin and was neither investigated nor substantiated.

Further the court found the first amendment was an ineffective defense for Evans's statements. In a brief reference to Evans's constitutional claim the court wrote: "[W]e are not persuaded. . . that the type of 'criticism' involved here is protected first amendment expression for which disbarment" would not be proper.

The court also concluded that denying Evans the right to call Smalkin as a witness also was not an error. Hearings in

disciplinary matters are mot automatically granted, the court explained. In addition, the court stated a hearing could not change the district court's decision, "in light of... [Evans's] failure to contest any factual issue or present mitigating circumstances."

**Will keep fighting**

From his home in Palm Beach,Fla. Evans Friday afternoon described himself as a competent lawyer who had been wronged: at one time admitted to practice in three states—Maryland, New York and California—formerly a lawyer with Cravath, Swaine & Moore and head if IBM's legal,department in New York and now a sole practitioner.

He claimed that notwithstanding the circuit court's ruling, he "will keep fighting this matter until the end" and insisted that his criticisms were merited.

Evans said he will file a motion for a rehearing of the case before the circuit court, and if necessary will file to seek a review of the case before the U.S. Supreme Court.

The Daily Record Second Section page 14
Vol. 197 No. 79 10-2-86

**Letters to the Editor**

Your article, "'Scurrilous' lawyer's disbarment affirmed" (Monday, Sept. 29,1986, page 1) deeply disturbs me as an attorney and, indeed, should deeply disturb all of us engaged in the practice of law.

If attorney Evans' only "wrong" was, as reported, the letter to then-Magistrate Smalkin, accusing him of incompetence and Jewish bias, it seems clear that the attorney's action was not only protected by the First Amendment but mandated by our duties as attorneys. Since we are officers of the court, it would be our sad duty, I think, to make an issue of any instance where anyone involved with the judicial system, be he/she judge, attorney, or any other participant, shows either incompetency or bias. If attorney Evans' evaluation of the situation about which he complained was simply incorrect, then the process reported on—referral to the chief judge of the federal judicial court—can be relied upon to fairly resolve the issue. If there was some other, improper motive behind the

complaint (although none is certainly shown in your article), then another matter exists and, perhaps, should be resolved by the attorney grievance process.

The Fourth Circuit is apparently more concerned with insulating its personnel from criticism than with protecting the First Amendment rights of citizens, and even attorneys, to protest bias suspected or perceived.

Robert L. Beaman

Baltimore

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-1569

FILED
OCTOBER 17,1986

In Re: Paul G. Evans,

Petitioner,

[CAPTION IN 4TH CIRCUIT]

FILED Oct 17 1986

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge.

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The petitioner's pro se petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Widener and Judge Murnaghan.

For the Court

/sJohn M. Greacen
CLERK

U.S.DISTRICT COURT MARYLAND

Louis J. Rogers and

James D. Brown

Plaintiffs

vs.

Vernon Walter Heath, Jr., and

Wheatley Trucking, Inc., a Maryland Corporation

Defendants

::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::C.A. JH 80-855

James D. Brown

Cross-Claim Plaintiff

v.

Louis D. Rogers

and

George T. Rogers

Cross-Claim Defendants

MAGISTRATE'S REPORT & RECOMMENDATION

I.

In September, 1979, plaintiff, then a resident of Michigan, and defendant George Rogers,then a resident of New Jersey, entered into an oral agreement over the telephone, whereby George Rogers agreed to take possession of plaintiff's car in order to sell it. Plaintiff was to receive $7,000 from the sale, with George Rogers' profit to be derived from any money in excess of the $7,000 obtained in selling the car. George Rogers flew to Michigan, took possession of the car, and returned to New Jersey.

By November, 1979, plaintiff lost patience with George Rogers' apparent inability to sell the car, and he made arrangements to travel East and regain possession of his vehicle. Late in that month, however, George Rogers told plaintiff that he had finally arranged to sell the car, and subsequently asked plaintiff to send him a power of attorney to enable him to transfer title to the purchaser. Plaintiff complied with this request, but when he later failed to receive his money, he again contacted George

Rogers. On December 31,1979, George Rogers told plaintiff that the car had been demolished in an accident. According to George Rogers, his brother, Louis Rogers, was driving the car to Virginia to show it to a prospective buyer, when it collided with a truck making a U-turn on a Maryland highway. The truck was driven by defendant Vernon Heath, while within the scope of his employment with defendant Wheatley Trucking, Inc.

Plaintiff filed two negligence actions. The first was filed in this Court in April 1980, with plaintiff Louis Rogers as the named plaintiffs and Heath and Wheatley Trucking as the named defendants. The second suit was filed in the Circuit Court for Dorchester County, Maryland, in May, 1980, with plaintiff claiming against defendants Heath and Wheatley Trucking. This latter case was dismissed, without prejudice as to plaintiff, to allow him to pursue his remedies in federal District Court. The April, 1980 federal suit was dismissed in February, 1981, pursuant to a $7,500 settlement agreement.

Plaintiff argues that, as he understood the agreement, he was to receive the full amount of $7,500. However, after receiving and depositing his check, he was advised by his counsel that $500 of it was to be paid to George Rogers. When plaintiff adamantly refused to remit any money to George Rogers, payment on the check was stopped by defendants. Plaintiff then rejected the settlement terms and moved to reopen the case. The motion was granted, to allow plaintiff to file the present complaint, which claims as follows:

| COUNT | DEFENDANTS | CLAIM | DAMAGES |
|---|---|---|---|
| I. | George Rogers<br>Louis Rogers | conspiracy to defraud | $10,000 compensatory<br>$10,000 punitive |
| II. | George Rogers<br>Louis Rogers | fraud and misrepresentation | $20,000 compensatory<br>$20,000 punitive |
| III. | Vernon Heath Wheatley Trucking | negligence | "the value of [plaintiff's] car and the loss of the use thereof" |

The case was referred to me by order of Judge Howard, in accordance with Local Rule 80, D.

Md., for resolution of all pending motions. These motions are:

| MOVANT | MOTION | PAPER NO. | DATE |
|---|---|---|---|
| Plaintiff | for partial summary judgment | 26 | May 26, 1982 |
| Defendants Rogers | to strike plaintiff's letter of December 31,1979 | 29 | June 2,1982 |
| " | for summary judgment | 35 | Oct. 27,1982 |
| " | for sanctions | 37 | Nov. 17,1982 |
| " | (renewed) | 47 | Nov. 26,1982 |
| " | to strike plaintiff's response to defendants' motion for summary judgment | 39 | Nov. 19,1982 |
| " | to enforce the settlement agreement | 41 | Nov. 22,1982 |
| " | to strike plaintiff's response to defendants Rogers motions | 49 | Dec. 3,1982 |
| " | for discovery sanctions against plaintiff | 53 | Dec. 17,1982 |
| " | to seal plaintiff's "Response to motions by Rogers suggestion that Court impose san- | 54 | Jan. 4,1983 |

| | | | |
|---|---|---|---|
| | ctions sua sponte against counsel for Rogers" | | |
| " | to strike plaintiff's response | 56 | Jan. 21,1983 |

II.

The first issue this Court must address is whether it has subject matter jurisdiction over plaintiff's claims. Clearly there is diversity of citizenship between the parties, as required by 28 U.S. C. § 1332. However, under the diversity statute, the amount in controversy must exceed $10,000. The standard by which a federal court determines whether the matter in controversy exceeds that amount is the "legal certainty" test:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal courts is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.... It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). Plaintiff's allegations that the matter in controversy exceeds the jurisdictional

amount is sufficient to meet the test unless—as in the instant case—the amount claimed is challenged. Id., 303 U.S. at 288. The burden then rests on the plaintiff to satisfy the court that the jurisdictional amount is really and substantially involved. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 188 (1936). In addition:

> It is a settled general rule that, in a suit based on diversity of citizenship brought against several defendants on separate and distinct claims depending for their validity upon a common origin, the test of jurisdiction is the amount of each separate claim and not the aggregate amount of the claims.

Fechheimer Bros. Co. v. Barnwasser, 146 F.2d 974, (6th Cir. 1945). Thus, plaintiff must meet the jurisdictional amount as against each defendant under all three of the counts in his complaint.

A.

In his third count, plaintiff prays for compensatory damages against defendants Heath and Wheatley Trucking "for the value of [his] car and the loss of the use thereof...." In Maryland, the measure of damages for destruction of personal property is the

market value of the good at the time and place of destruction. Weishaar v. Canestrale, 241 Md. 676, 217 A.2d 525 (1966). Plaintiff can also recover damages for the loss of use of his automobile, restricted to a reasonable period during which plaintiff was deprived of his vehicle. Schweitzer v. Showell, 19 Md. App. 537, 313 A.2d 97 (1974). In the instant case, plaintiff failed properly to allege the specific amount in controversy, which itself renders the complaint defective, though subject to cure by amendment. Schelesinger v. Councilman, 420 U.S. 738 (1975). However, amendment of this complaint would be fruitless. By his own estimation, as evidenced by the sale agreement between him and George Rogers, plaintiff's vehicle was worth $7,000 at the time of the accident. Even allowing for some reasonable profit on resale, the car's value could not conceivably have exceeded $10,000. Beyond that, aside from bald allegations that he suffered the loss of the use of his car, no amount has been stated by plaintiff regarding how much was spent (and for what period) in renting a

substitute vehicle.[1] Thus, despite defendants' challenge to the jurisdictional amount, plaintiff has provided no other evidence to indicate that the amount in controversy exceeds $7,000. Therefore, plaintiff has failed in his burden of satisfying the Court that the jurisdictional amount requirement as against Heath and Wheatley Trucking is really and substantially satisfied. St. Paul Mercury Indemnity Co., 303 U.S. at 288. For that reason, plaintiff's negligence claim against Heath and Wheatley Trucking should be dismissed for lack of subject matter jurisdiction.

B.

Plaintiff's second and third counts (sic) [should read first and second counts] allege that the Rogers brothers conspired to and actually did commit fraud in their dealings with plaintiff. Under the conspiracy claim in Count I, plaintiff alleged compensatory damages of $10,000,with an equal amount of punitive damages claimed. These damage amounts were both doubled (to $20,000) under the

fraud and misrepresentation claims in Count II.

The amount in controversy is measured by the direct value of the object of the suit or the right sought to be enforced,and it can include punitive damages if those damages are permitted under governing law. Totaro v. Lyons, 498 F. Supp. 621 (D.Md. 1980) Both of plaintiff's claims stem from the breakdown of his contractual relationship with George Rogers. If these claims are pure contract actions, it is well settled under Maryland law that no punitive damages would be recoverable. H & R Block, Inc. v. Testerman, 275 Md. 36, 338 A.2d 48, 52 (1975). However, punitive damages are recoverable in tort actions arising out of contractual relationships, if actual malice can be proved:

> Actual or express malice—at least in this context—has been characterized as the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff. [Citations omitted]

Id., 338 A.2d at 52. There has been no attempt by plaintiff, in his pleadings or other documents

submitted,to show any evidence of actual malice on either George or Louis Rogers' part. In fact, plaintiff and Louis Rogers have never met nor have they ever had any kind of communication. Their only "connection" is the fact that Louis Rogers was driving plaintiff's car at the time of the accident. With respect to George Rogers, plaintiff alleges that the defendant lied to him concerning the fact that the car had been sold, when in fact it had already been involved in an accident. However, even if this allegation were proved, there would still be no sufficient allegation that George Rogers was guided by an evil or rancorous motive influenced by hate, with a purpose to deliberately and willfully injure plaintiff. Thus, punitive damages would not be recoverable.

Plaintiff argues, however, that the claims raised in his first and second counts are not torts arising from a contractual relationship, but rather are pure tort actions stemming from the Rogers' fraudulent misrepresentations to plaintiff. Under Maryland law, actual malice need not be proved

in order to recover punitive damages on a claim of fraud; only legal malice is required:

> ... [T]o recover punitive damages in actions of deceit, an element of aggravation, evidenced by malicious, deliberate, gross, or wanton conduct... must accompany the fraud.... [W]hile aggravated circumstances must be shown to justify an award of punitive damages in fraud cases, proof of actual malice, as defined in Maryland, is not a prerequisite.

Wedeman v. City Chevrolet Company, 278 Md. 524, 366 A.2d 7, 11-12 (1976).[2]

However, to determine whether a claim is pure tort or a tort arising from a contractual relationship, it must be ascertained whether the alleged fraud induced the making of a contract or whether the fraud arose from the contractual relationship itself. If the contractual relationship existed before the tortious conduct, then it is characterized as a tort arising from a contractual relationship, and the Testerman requirement of actual malice applies to the recovery of punitive damages. Conversely, if the fraud induced the making of the contract, then the deceit stands as a separate tort, and only legal malice is

required to obtain punitive damages under Wedeman. In the instant case, the contractual relationship preceded the alleged tortious conduct. Plaintiff voluntarily relinquished possession of his car to George Rogers, and, in fact, may actually have initiated the contract (the pleadings are unclear on this detail). Only after the contract was formed and George Rogers had possession of the auto did it become apparent to the plaintiff that George Rogers was unable or unwilling to sell the vehicle.

Because plaintiff has not alleged facts sufficient to show actual malice as to these claims, punitive damages cannot be used in the computation of the jurisdictional amount. Therefore, the jurisdictional amount in Count I is reduced to the $10,000 claim for compensatory damages and in Count II to the $20,000 in compensatory damages. Under the statute itself, the jurisdictional amount claimed in Count I is inadequate; the statute requires that the matter in controversy exceed the sum or value of $10,000, exclusive of interests (sic) and costs...." (sic)

28 U.S.C. § 1332. [Emphasis added].

In addition, with respect to the amounts claimed in Counts I and II, this Court is of the opinion that these claims were not made in good faith, but were alleged solely in order to obtain federal diversity jurisdiction:

> On its face, the phrase "good faith" would seem to imply that the relevant consideration is the plaintiff's state of mind and that, therefore, it is a subjective test....But it is obvious that plaintiff's actual mental state can never be satisfactorily measured without recourse to objective facts. Thus, the basic criterion for determining "good faith" is that "it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

Janconski v. Avisum Corp., 359 F.2d 931, 934 (3d Cir. 1966). In this case, plaintiff's only damages arose from the destruction of his car, which he himself valued at $7,000. This sum falls short of the $10,000 jurisdictional amount. The additional damages in the complaint are without any factual basis; plaintiff has failed to sustain the Court's jurisdiction by any competent proof. See Payton v. Freeze, 49 F.R.D. 11, 14 (E.D. Va. 1969). Therefore, this Court has no

subject matter jurisdiction over plaintiff's Counts I and II under 28 U.S.C. § 1332. See Arnold v. Troccoli, 344 F.2d 842 (2d Cir. 1965); Christensen v. Northwest Airlines, Inc., 455 F. Supp. 492 (D. Ha. 1978), aff'd., 633 F.2d 529 (9th Cir. 1980).

III.

In conclusion, in accordance with the foregoing report, I respectfully recommend that, upon the expiry of time allowed in FED. R. CIV. P. 72 and Local Rule 82, D.Md., for taking exceptions hereto,an order be entered dismissing this case for lack of subject matter jurisdiction, and thus settling all pending motions as moot.

s/Frederic N. Smalkin
Frederic N. Smalkin
United States Magistrate

Dated Sept. 11,1984

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1. Plaintiff testified at his deposition that the first two or three substitute vehicles were rented on an ad hoc, informal cash basis during 1979 and 1980: "Something like maybe twenty-five dollars for a couple of days, something like that." (Plaintiff's deposition, Paper No. 36, p. 101). Plaintiff was only able to specify the monthly rate ($150) on the third vehicle,

rented in 1981.

In addition, plaintiff admitted that he purchased a used car, and used it for several months, during the same time that he rented the above mentioned vehicles.

Despite the defendants' request for a copy of the rental and purchase agreements (or affidavits from the renters), plaintiff failed to comply. (Paper No. 48).

2. No party has suggested that any substantive law other than that of Maryland should apply.

(CASE CAPTION p. 49)

MEMORANDUM

On March 24,1982 plaintiff James D. Brown filed a three-count complaint against defendants Louis D. [J.] Rogers and George T. Rogers, and defendants Vernon Walter Heath, Jr., and Wheatley Trucking, Inc., alleging conspiracy to defraud, fraud and misrepresentation, and negligence in the sale and subsequent destruction of his automobile. The Court referred the case to United States Magistrate Frederic N. Smalkin under Local Rule 80 for a proposed ruling on all pending motions. On September 11,1984, Magistrate Smalkin issued his report recommending that an order be entered dismissing the case for lack of subject matter jurisdiction, thereby rendering all pending motions moot. Nine days later, plaintiff filed his objections to the report.

I.

The facts leading to the present litigation are not complex. They are aptly presented in the Magistrate's report and are reproduced here in full.

[Pages 50-52 of this APPENDIX to Table Captioned COUNT—DEFENDANTS—CLAIM—DAMAGES set forth in haec verba]

II.

Counts I and II of the plaintiff's complaint allege that defendants George T. and Louis D. Rogers [hereinafter referred to as Louis J. Rogers] conspired to defraud him and in fact were fraudulent and deceitful in their dealings with him with respect to the sale of his car. Plaintiff prayed for $10,000 in compensatory and $10,000 in punitive damages against the Rogers' under the conspiracy count (Count I) and $20,000 in compensatory and 20,000 in punitive damages under the fraud and misrepresentation count (Count II).

The Magistrate found that since the

"contractual relationship preceded the alleged tortious conduct" actual malice and not legal malice needed to be proven before punitive damages could be recovered (Report at 9 [ herein p. 61]). Magistrate Smalkin then reasoned that " [b]ecause plaintiff ha[d] not alleged facts sufficient to show actual malice as to these claims, punitive damages [could not] be used in the computation of the jurisdictional amount" (id. at 10, herein at 61). This left plaintiff with claims against defendants for compensatory damages totalling $30,000. The Magistrate determined, however, that "these claims were not made in good faith, but were alleged solely in order to obtain federal diversity jurisdiction..." (id. herein 62). Magistrate Smalkin paid particular attention to the fact that "plaintiff's only damages arose from the destruction of his car, which he himself had valued at $7,000 [,]" an amount "short of the $10,000 jurisdictional amount (id. at 10-11 herein 62). Finding no factual basis for the additional damages prayed for in plaintiff's claims, the

Magistrate concluded that there was no subject matter jurisdiction under 28 U.S.C. § 1332.

Plaintiff objects to the Magistrate's findings that "the contractual relationship preceded the alleged tortious conduct." Specifically, he argues that "fraud in the inducement was the way the complaint was formed and [he] will stand on the allegations in the document. SEE PARAGRAPHS 25-29 and 31-34" (Objections to Magistrate's Report and Recommendation at 3). The Court does not read the complaint this way. To be sure, pleadings should be construed liberally. When a litigant has the assistance of counsel, however, a certain degree of clarity and specificity is to be expected in the presentation of claims. This complaint falls far short of that mark. If fraud, in plaintiff's estimation, preceded the formation of the contract, then his counsel should have stated so in a few clear words. He did not. In short, the Court finds that the record in this case supports the Magistrate's determination that "[o]nly after the con-

tract was formed and George Rogers had possession of the auto did it become apparent to plaintiff that George Rogers was unable or unwilling to sell the vehicle" (Report at 10; emphasis in original [herein at 61]). This leads the Court to plaintiff's second objection.

The Magistrate Smalkin found that the jurisdictional amount claimed in Count I ($10,000 in compensatory damages) was inadequate because 28 U.S.C. §1332 requires that "the matter in controversy excee[d] the sum or value of $10,000, exclusive of interest and costs...."[2] Furthermore, he concluded that the claims contained in Counts I and II "were not made in good faith, but were alleged solely in order to obtain federal diversity jurisdiction" (id.herein 62).

Plaintiff objects to the finding and characterizes it as an example of "cavalier reasoning" (Objections to Magistrate's Report and Recommendation at 2). His attack on the Magistrate's finding is three-fold. "First, the initial counsel who

represented [him] in this action ... and counsel for the Rogers jointly signed the initial complaint and the PRE-TRIAL ORDER submitted on or before February 6,1981 respectively set forth damages [at] . . . $12,000 and $9,000 . . . . Second [plaintiff] . . . profers [sic] to prove each and every fact set forth in his affidavit. Third [his] counsel had no reason to inflate the property loss because he unlike the Magistrate was aware of the doctrine of pendent jurisdiction . . ." (id.). The Court finds the plaintiff's objections devoid of any merit.

"Ordinarily the jurisdictional amount [requirement under 28 U.S.C. § 1332] is determined by the amount of the plaintiff's original claim, provided that the claim is made in good faith." Wiggins v. North American Equitable Life Assurance Co., 644 F.2d 1014, 1016 (4th Cir. 1981) (citation omitted); see Payton v. Freeze, 49 F.R.D. 11 (E.D. Va. 1969). Mc Donald v. Patton, 240 F.2d 424, 426 (4th Cir. 1957). As noted by the Supreme Court in St. Paul Mercury

Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938):

> [I]f from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, of if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purposes of conferring jurisdiction, the suit [must] be dismissed.

Id. at 289 (footnote omitted); Nixon v. Local Order of Moose No. 750, 285 F.2d 250, 252 (4th Cir. 1960); Wallace v. Hartford Insurance Co., 583 F. Supp. 1108, 1119 (W.D. Va. 1984); Heavner v. State Automobile Insurance Co. of Columbus, 340 F. Supp. 391, 393 (W.D. Va. 1972).

After reviewing the record in this case, the Court is satisfied that the aforementioned test has been met. Plaintiff directs the Court's attention to his original complaint and the so-called "duly notarized affidavit of December 31,1979" in support of his contention that his claims are made in good faith. As discussed above, however, the legal certainty test does not stop at the litigant's good faith. Indeed, it

expressly goes beyond it. The damages prayed for in this litigation arose from the destruction of an expensive automobile. Nevertheless, it appears to a legal certainty that however camouflaged, plaintiff's claims are for less than the jurisdictional amount.

Plaintiff also suggests in his objections that the doctrine of pendent jurisdiction would cure any jurisdictional deficiency present in this case. Although not very clear, plaintiff's argument seems to be predicated on the concept of pendent party jurisdiction. That is to say, because the jurisdictional amount requirement was satisfied by Louis J. Rogers in the suit plaintiff and Rogers filed against defendants Heath and Wheatley Trucking, the Court can consider his claims against these defendants and the Rogers brothers even though they may be for less than $10,000. The Court disagrees.

Had plaintiff's claim in the original complaint been challenged, it would have been dismissed for failure to meet the jurisdictional amount

requirement. Plaintiff could not have relied on the claim of Louis Rogers to sustain his own deficient claim. See Zahn v. International Paper Co., 414 U.S. 291 (1973). His contention that because he participated with Louis Rogers in a previous suit, the Court may entertain his present claims under pendent party jurisdiction is totally meritless. In short, the Court finds that plaintiff's claims against defendants Louis and George Rogers, and defendants Heath and Wheatley Trucking do not satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332. Accordingly, the Court adopts and accepts the Magistrate's Report and Recommendation that this case be dismissed for lack of subject matter jurisdiction.

A separate order will be entered.

s/Joseph C. Howard
Joseph C. Howard
United States District Judge

Dated: November 19th, 1984

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[1]In reviewing plaintiff's objections, the Court looks to

28 U.S.C. § 636(b)(1)(C) which provides, in pertinent part:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

See United States v. Blair, 493 F.Supp. 398 (D.Md. 1980), aff'd, 665 F.2d 500 (4th Cir. 1981); cf. Camby v. Davis, 718 F.2d 198 (4th Cir. 1983) (in the absence of objections, no need for court to explain why it adopted magistrate's report).

[2]It should be noted, however, that in considering the claims contained in Counts I and II against the defendants Louis and George Rogers individually, "[e]ven if no single claim [was] for an amount in excess of $10,000, jurisdiction [would] exis[t] for each count." Griffin v. Red Run Lodge, Inc., 610 F.2d 1198, 1204 (4th Cir. 1979) (citations omitted).

UNPUBLISHED OPINION OF FOURTH CIRCUIT IN 84-2380 SUBMITTED OCTOBER 28,1985, DECIDED JANUARY 2,1986 BEFORE THE HONORABLE JUDGES SPROUSE, WILKINSON, AND SNEEDEN

Louis J. Rogers, Plaintiff

and

James D. Brown, Appellant

v.

Louis J. Rogers; George T. Rogers; Vernon Walter Heath, Jr.; Wheatley Trucking, Inc., a Maryland Corporation,

Appellees.

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard,

District Judge. (C/A 80-855)

(Paul G. Evans, for Appellant. Appellees Pro Se.)

PER CURIAM:

James D. Brown appeals from the order of the district court dismissing his complaint filed against Louis Rogers; George Rogers; Vernon Heath, Jr.; and Wheatley Trucking, Inc. The district court dismissed Brown's diversity action for failure to satisfy the jurisdictional amount. We affirm.

Brown sued brothers Louis and George Rogers for fraud and deceit, and conspiracy to defraud, claiming that the brothers used Brown's car for their own enjoyment while representing to Brown that they were attempting to sell it. Brown claimed that Louis Rogers totaled Brown's car and that George Rogers thereafter continued to tell Brown that he was negotiating the sale of the car, concealing from Brown the fact that the car had been wrecked. Brown

sued Heath and Heath's employer, Wheatley Trucking, for negligence, claiming that Heath was at fault in the accident that resulted in the loss of Brown's car. Brown sought compensatory and punitive damages from the Rogers and compensatory damages from Heath and Wheatley Trucking.

In moving to file his supplemental complaint, Brown stated that the value of the car was $7,500. This figure was also the amount of a prior negotiated settlement agreement and, we find, is the proper figure to use in determining whether Brown's claims satisfy the jurisdictional amount. Under Maryland law, Brown may also recover damages from Heath and Wheatley for the loss of the use of his car restricted to a reasonable period during which Brown was deprived of its use by virtue of the accident. See Schweitzer v. Showell, 19 Md. App. 537, 313 A.2d 97 (1974). We note that Brown was in the process of selling his car at the time of the accident. Assuming,

however, that Brown may nevertheless claim for the loss of its use for a reasonable period of time, the claim is for less than $2500 and so does not bring Brown's claim for compensatory damages up to the jurisdictional amount.

The amount in controversy is determined as of the time an action is commenced. See 14A C. Wright, A. Miller, and E.Cooper, Federal Practice and Procedure § 3702 at 28-29. (2d. ed. 1985). Brown initially filed suit against Heath and Wheatley on April 9,1980. That action was dismissed upon an agreed settlement, but when problems arose with the settlement Brown was permitted to reopen his claims.[1] Brown may not take advantage of the fact that he voluntarily dismissed and then reopened his claims against Heath and Wheatley Trucking, but is bound by the April 9,1980 initial filing date as the outside of any reasonable period for his loss of use claim.

Brown testified at his deposition that he

rented cars from friends from December 1979 through the early part of 1980. He stated that he would rent a car for a couple of days, usually over the weekend, and would pay either twenty-five or fifty dollars. Even assuming that Brown rented a car for fifty dollars every weekend between December and April, his claim for loss of use would be substantially less than $2500. We accordingly conclude that the district court correctly determined that Brown's claim for compensatory damages was, "to a legal certainty," less than $10,000. St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

We now turn to Brown's claim for punitive damages on his fraud claims against George and Louis Rogers. Punitive damages may be included in determining whether the jurisdictional amount has been satisfied if such damages are allowed under governing law. Under Maryland law, if a contractual relationship existed before the tortious conduct, then

punitive damages may only be recovered upon a showing of actual malice; but if the fraud induced the making of the contract, a showing of legal malice is sufficient.[2] See Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976). The district court determined that Brown had alleged fraud arising out of his contractual arrangement with George Rogers, not fraud in the inducement of that contract. Therefore, to obtain punitive damages Brown had to show actual malice, defined as an evil or rancorous motive influenced by hate, with a purpose deliberately and willfully to injure him. The district court concluded that Brown had not asserted and the record did not suggest that the Rogers acted with actual malice. Accordingly, the court rejected Brown's claim for punitive damages and, along with it, his assertion of the jurisdictional amount.

It is appropriate for a district court to scrutinize closely a punitive damage claim used as a

basis for federal jurisdiction to ensure that the claim has a colorable foundation in law and fact. See Kahal v. J. W. Wilson & Associates, Inc., 637 F.2d 547, 549 (D.C. Cir. 1982). See also Wiggins v. North American Equitable Life Assurance Co., 644 F.2d 1014 (4th Cir. 1981). Upon a careful review of Brown's complaint and the rest of the record we conclude that the district court properly characterized Brown's claims of fraud as arising out of rather than leading to the contractual relationship. The district court also correctly held that there was no indication that the Rogers acted out of malice. We accordingly find no error in the district court's conclusion that Brown did not have a colorable punitive damage claim.

In closing we note that Brown has strenuously maintained in the district court and on appeal that the court had pendent jurisdiction of his claims under Stone v. Stone, 405 F.2d 94 (4th Cir. 1968). Stone involved the aggregation of a single plaintiff's claim

against several defendants and does not, as argued by Brown, allow the district court to exercise jurisdiction over Brown's claims because the previously dismissed claims of another plaintiff exceeded the jurisdictional amount.[3] The district court properly applied Zahn v. International Paper Co., 414 U.S. 291 (1973), in rejecting Brown's assertion of pendent jurisdiction.

The judgment of the district court is affirmed. We dispense with oral argument because the dispositive issued (sic) recently have been decided authoritatively.

AFFIRMED

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1. On reopening of the case, Brown added claims against George and Louis Rogers.

2. As noted by the magistrate, the parties have not claimed that any law other than that of Maryland governs the determination of Brown's remedies.

3. Nor can Brown satisfy the jurisdictional amount by aggregating his fraud and negligence claims, as the claims do not arise from a common nucleus of operative fact. See Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 847-48 (4th Cir.1974).

[Letterhead of Judge Miller]

September 24, 1985

[Addressed to Evans] CONFIDENTIAL

Re: Disciplinary proceedings in connection with the case of Brown v. Rogers (D.Md.) Civil Action No. JH-80-855

Dear Mr. Evans

The Disciplinary Committee of this Court has received a complaint from Magistrate Frederic N. Smalkin in connection with your conduct in writing a letter, dated June 24, 1985. In that letter, in reference to the above captioned case, you stated that the Report and Recommendation of the Magistrate " . . . was either the result of . . . incompetence in the matter or perhaps worse and reflected a Jewish bias in favor of the Kaplan firm whose actions were in [your] judgment inexcusable . . .".

This letter arguably is a violation of DR 1-102(A)(5) ["A lawyer shall not engage in conduct that is prejudicial to the administration of justice."]; DR 7-106(C)(6) ["In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal."]; and DR 8-102(B) ["A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."].

This letter is being written to you to provide you the opportunity to set forth in writing any explanation that you care to make in justification of your actions.

The Committee believes it appropriate to defer any action on this complaint until after the appeal to the Fourth Circuit Court of Appeals in the above-captioned civil case has been resolved. If you have any objections to that deferral of action, said objection should be submitted to the undersigned member of this Court, on behalf of the Disciplinary Committee, within twenty (20) days of this date.

Very truly yours,

James R. Miller, Jr.
United States District Judge
(On behalf of the Disciplinary
Committee of the U.S. District
Court for the District of Maryland

cc: Members of the Disciplinary Committee

[Letterhead of Paul G. Evans]
September 27, 1985
[Addressed to Judge Miller]

Disciplinary proceeding in re Brown v. Rogers
(D. Md.) Civil Action No. JH-80-855

Dear Judge Miller:

This will acknowledge receipt of yours of the 24 inst. In respect of the opportunity you have afforded me to set forth in writing any explanation I care to make, I stand on the record in the above case as well as the record in the proceedings in the Fourth Judicial Council, copies of which are enclosed.

I repeat my charge that Magistrate Smalkin was either incompetent or biased and I note he has failed to deny either charge. I desire an opportunity to call the Magistrate and examine him under oath if a hearing is held in this matter. I do not personally know him and if there is to be a hearing I desire ample notice so that I might investigate his background and read opinions authored by him.

In so far as deferring until after the appeal I object. The outcome of the appeal or a petition for certiorari if the decision is affirmed is at most an attenuated circumstance which should not have a controlling influence on whether I engaged in conduct prejudicial to the administration of justice or engaged in conduct which is degrading to a tribunal.

cc Magistrate Smalkin
Mr. James Brown

Very truly yours,

Encls.

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[Letterhead of Paul G. Evans]

[Addressed to Judge Miller] November 2,1985
[mailed 10-2-85]

[Same caption]

Dear Judge Miller:

In further response to your letter of September 24,1985, I wish to advise that I desire that this matter not be confidential. Further I would appreciate your advising me where I may obtain a copy of the local rules concerning disciplinary matters and disbarment as well as advising me the names of the members of the Disciplinary Committee who will act upon this matter.

In respect of my desire to proceed forthwith, I point out that in the event of a remand, my client Brown will need counsel and thus I desire to settle this proceeding as soon as possible in order that he will be able to make other arrangements in the event I am suspended from practice before this court.

Finally I desire as I stated in my letter of September 27 to call Magistrate Smalkin as a witness and thus would appreciate receiving the necessary forms so that I may complete and submit them for a subpoena duces tecum to secure the presence of Magistrate Smalkin with the relevant notes he may have made in regard to his opinion set forth in his Report and Recommendation in the above matter.

Very truly yours

s/Paul G. Evans

cc James Brown

[Letterhead of Judge Miller]

November 5,1985

86

[Same caption]

Dear Mr. Evans

The Disciplinary Committee of this Court has received and considered the materials mailed by you on September 27, 1985 and the letter from you, apparently misdated November 2, 1985 (received October 7,1985).

Notwithstanding your stated desire "to proceed forthwith" in connection with the complaint of Magistrate Federic N. Smalkin, the Committee, after considering the matter, still believes it appropriate to defer any action on this complaint until after the appeal to the Fourth Circuit Court of Appeals in the above-captioned civil case has been resolved. It is our understanding that the civil caase is designated as No. 84-2380 in the Fourth Circut Court of Appeals.

Very truly yours,
/s James R. Miller, Jr.
United States District Judge

cc: Members of the Disciplinary Committee

[Letterhead of Paul G. Evans]

[Addressed to Judge Miller]

November 8, 1985

[Same caption]

Dear Judge Miller,

This will acknowledge receipt of yours of the 5th. I find the decision of the Disciplinary Committee to defer any action in this matter until after the appeal has been resolved is incredible. I repeat my claim that Magistrate Smalkin either was grossly incompetent or biased in favor of the Jewish firm that represented the defendants Rogers in Brown v. Rogers, C.A. No. JH-80-855 and against me and my client Brown, or both. I now repeat such charge and will continue to hold such belief and forthrightly make such

claim notwithstanding the outcome of any appeal. Thus if my filing a complaint with the Judicial Council pursuant to Rules Handling Complaints of Judicial Misconduct or Disability, and my advising the Magistrate of my actions long after the appeal had been filed in the aforesaid matter is grounds for proceeding against me do so.

Not only is the pendency of this proceeding a matter which compromises my right to practice before your court but it also disadvantages my client and should be promptly resolved.

I have by my letter of November 2 (misdated and actually prepared and mailed October 2) sought the names of the persons comprising the Disciplinary Committee. I repeat the request and believe that this is hardly priviledged information. One reason for my request is that I may seek the recusal of some of such members and state that you will be asked to recuse yourself and an appropriate affidavit of bias will be filed.

I do not understand how there can be any confusion about the designation of the appeal to which you consider it appropriate to defer action in this matter. I sent you not only my Brief in such appeal but also my Motion for Summary Refersal as well as the pleadings before the Judicial Council. As I stated in my earlier correspondence I never have seen Smalkin, never appeared before him, and the only matter he ruled on that I know of is the reference in Brown v. Rogers. There was not any hearing and the Magistrate decided the matter without the benefit of brief, memoranda or argument. Thus if you desire that I confirm the designation of the appeal as 84-2380 I do so.

Please acknowledge receipt of this letter.

cc James D. Brown Very truly yours,

[Letterhead of Judge Miller]

November 18,1985

Dear Mr. Evans:

The members of the Disciplinary Committe are Judge

R. Miller, Jr., Judge Walter E. Black, Jr., and Judge J. Frederick Motz.

The Local Rules concerning disciplinary matters can be obtained from The Daily Record Company, 11-15 East Saratoga Street, Baltimore, MD 21202.

Very truly yours

cc. Members of the Disciplinary Committee.

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

**86-9504**

| | | |
|---|---|---|
| IN THE MATTER OF | : | |
| Paul G. Evans | : | |
| Respondent | : | |
| STATE OF FLORIDA ) | : | AFFIDAVIT |
| ss | | OF BIAS |
| COUNTY OF PALM BEACH) | : | |

PAUL G. EVANS, being duly sworn, deposes and says:

1. He is the above respondent in the within proceeding.

2. He was admitted to practice in New York in 1950 and thereafter was an associate at the firm of Cravath, Swaine & Moore for five years. He later was Director of

Industrial Relations for Remington Rand Corporation, head of the legal department of International Business Machines Corporation, and did appellate work for Public Citizen, a Nader affilated group. He has for many years been a sole practitioner doing criminal and civil work.

3. He makes this affidavit of bias of U.S. District Judge James R. Miller, Jr., for the District of Maryland, against your affiant.

4. Shortly after being admitted to practice in that Court your affiant represented a black, indigent criminal defendant and appeared before Judge Miller in the capacity of counsel for the defendant. Your affiant had a continuing sharp exchange with Judge Miller who among other things appointed the foreman of the jury over counsel's objection and failed to rule on several motions. Judge Miller summoned counsel to his chambers and stated he did not like the manner of counsel. Counsel responded that he was duty bound to represent his client to the best of his ability and he had no intention of permitting anything or anyone of interfering with that duty. The matter was subsequently

appealed by your affiant to this court and the conviction was affirmed.

5. Your affiant's son, Robert Dow Evans, advised affiant shortly after the aforesaid case that his mother had been advised by a Judge of the Maryland District Court who was a friend of hers at Fishers Island, New York that your affiant had a reputation of being an inept lawyer in Maryland. Your affiant on information and belief alleges that Judge Miller was the source of that slander.

6. Your affiant, pro se, commenced an anti-trust action against Chesapeake and Potomac Telephone Company at Maryland for turning off his service because he had connected an answering machine thereto. This complaint was modeled after a pending action in the District of Columbia District Court which was eventually assigned to Judge Greene and resulted in the breakup of the Bell System. Judge Miller dismissed your affiant's complaint on the ground that he could not conduct an anti-trust suit.

7. Judge Miller initially corresponded with your

affiant when the complaint of Magistrate Smalkin was directed to his attention. Your affiant incorporates hereat as though it were physically annexed hereto his Appendix to his motion for Summary Reversal of the disbarment order based upon the Report of Judge Miller as well as such motion.

8. Your affiant when he wrote Judge Miller in respect of the disbarment proceedings (page 14 of Motion) "you will be asked to recuse yourself and an appropriate affidavit of bias will be filed" thought that Judge Miller had voluntarily stepped aside since it was another Judge who issued the OSC and Judge Miller in response to your affiant's letter set forth the 5 judges assigned to the Disciplinary Committee and the Rules called for a three judge panel (Rule 2a, V.D.) when complaint was brought by a judge.

9. Judge Miller's character and moral analysis is in your affiant's judgment an extreme example of judicial corruption and bias:

> Mr. Evans acted originally and continues to act, in a way which is prejudicial to the administration of justice in violation of DR

> 1-102(a)(5), in a way which is undignified and discourteous and degrading to a tribunal in which he appeared in his professional capacity, in violation of DR 7-106(C)(6), and that he made accusations against a judge or other adjudicatory officer which he knew or should have known were false, in violation of DR 8-102(B). In view of the circumstances outlined here, the undersigned member of this Court is of the view that the respondent **lacks the necessary mental and character qualifications to continue to practice law in this Court. Accordingly, it is recommended by the undersigned judge that the full Court enter an order disbarring Mr. Evans from further practice in this Court.**

and wholly uncalled for by one protected from suit for slander and libel by his judicial immunity.

10. On information and belief Judge Miller deceitfully stepped down and then arranged that he be assigned to write the Recommendation when in fact he should have recused himself from this matter.

Sworn to and subscribed
before me this 13th day
of March 1986

/sWanda Adams
Notary Public State of
Florida. My commission
expires May 17,1986

s/Paul G. Evans

DECLARATION OF ADMISSION TO PRACTICE

In Re Paul G. Evans Disciplinary No. 86-9504

I, Paul G. Evans, am the attorney who has been served with a notice to show cause why disciplinary action should not be taken in the above captioned matter.

I am a member of the bar of this court.

I have been admitted to practice before the following State and federal courts in the years, and under the license record numbers shown below:

| | | |
|---|---|---|
| New York Court of Appeals | 12-4-50 | |
| U.S. District Court, S.D.N.Y. | 1-26-51 | |
| U.S. Court of Appeals 2d Cir. | 5-7-51 | |
| Supreme Court of California | 1-7-71 | 047750 |
| U.S.D.C. S.D. California | 1-7-71 | |
| U.S. Court of Appeals 9th Cir. | 11-30-71 | |
| U.S. Supreme Court | 10-9-73 | |
| U.S.C.A. D.C. Cir. | 11-21-73 | |
| D.C. Court of Appeals | 3-13-74 | 189092 |
| U.S.D.C. D. of C. | 3-28-74 | |

| | |
|---|---|
| Maryland Ct. of Appeals | 5-6-75 |
| U.S.D.C. Md. | 5-16-75 |
| U.S.C.of A. 4th Cir. | 8-11-76 |
| U.S. Court of Military Apps. | 6-7-77 |

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13,1986 s/Paul G. Evans

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This declaration must be signed and delivered to the court with the attorney's answer to the notice to show cause or any waiver of an answer. Failure to return this declaration may subject an attorney to further disciplinary action. Under 28 U.S.C. § 1746, this declaration under penalty of perjury has the same force and effect as a sworn declaration made under oath.

## ARTICLE III U.S. CONSTITUTION

Section 2. The judicial power shall extend to all cases in law and Equity, arising under this Constitution,the Laws of the United States, and Treaties made, or which shall be made, under their Authority:— * * * to Controversaries between two or more States:— betweeen a State and Citizens of another State:— between Citizens of different States * * *.

## FIRST AMENDMENT

### Article I

Congress shall make no law * * * abridging the freedom of speech or the press * * *.

## FIFTH AMENDMENT

### ARTICLE V

No person shall be * * * nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT

Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have assistance of Counsel for his defense.

18 U.S.C. § 401. Power of court

A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

FEDERAL RULE OF CRIMINAL PROCEDURE 42

(a) Summary Dispositions. A criminal contempt may be

punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt * * * shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. * * * If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial

or hearing except with the defendant's consent. * * *

28 U.S.C. § 636(b)(1)(B) and (e)

(b)(1) Notwithstanding any provision of law to the contrary

* * *

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by the judge of the court, of any motion excepted in subparagraph (A), [includes motion for summary judgment] * * *

* * *

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: * * * (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; * * * (5) any other act or conduct which if committed before a judge of the district court would

constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon the person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district shall thereupon, in a summary manner, hear the evidence as to the act or conduct cvomplained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt commmitted before a judge of the court, or commit such person upon the conditions applicabe in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

FEDERAL RULE OF CIVIL PROCEDURE 72(b)

(b) Dispositive Motions and Prisoner Petitions. A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party * * * shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate deems necessary. The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. * * *

[ See Wright, Miller and Cooper, Federal Practice and Procedure 2d Vol 12 §§ 3076.7 thru 3076.9]

28 U.S.C. § 372

(c)(1) Any person alleging that a * * * magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts * * * may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of

the facts constituting such conduct.

* * *

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may—

(A) dismiss the complaint if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceding if he finds the appropriate corrective action has been taken.

* * *

(10) A complainant * * * aggreived by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. * * *

28 U.S.C. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs,

and is between—

(1) citizens of different states

* * *

(2) For the purposes of this section * * * a corporation shall be deemed a citizen of any State by which it has been incorporated and the State where it has its principal place of business.